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IN THE

Supreme Court of The United States

October Term 1977

No. 77-185

MORTON P. ROME and MARJORIE T. ROME,
Trustees Under A Trust Agreement,

Petitioners,

v.

INDIAN HEAD INC. et al.,

Respondents.

PETITION for a WRIT OF CERTIORARI to THE UNITED STATES COURT OF APPEALS for THE SECOND CIRCUIT.

BRIEF FOR DEFENDANTS-RESPONDENTS IN OPPOSITION.

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BRIEF FOR DEFENDANTS-RESPONDENTS IN OPPOSITION.

Defendants-respondents submit this brief in opposition to the petition for a writ of certiorari. We do not take issue with the petitioners' references to the "Opinions Below" (Petition, p. 1) or their statement of the basis for the Court's Jurisdiction (Petition, p. 2). We do not believe that petitioners' statement of "Questions Presented for Review" raises any question reviewable by the Court.

COUNTER-STATEMENT OF THE CASE

We refer to and rely for our Statement of the Case upon the district court's thorough exposition of the facts concerning this litigation and its settlement. Petition, Appendix A1-10 (hereinafter "A___"). We will not repeat those facts, but will comment on petitioners' misstatements of them and will summarize the proceedings subsequent to the district court's approval of the settlement.

Under the Stipulation and Agreement of Settlement (the "Settlement Agreement"), Thyssen-Bornemisza Inc. ("TBI") agreed to make cash payments to members of classes of former owners of convertible subordinated debentures ("Debentures") and warrants to purchase common stock ("Warrants") of Indian Head Inc., and to all owners of Indian Head common stock ("Common Stock"), Debentures and Warrants who owned their securities both as of the date of the Court's order of August 2, 1976 directing notice to the classes and the date of the proposed merger of Indian Head into a subsidiary of TBI, Thyssen-Bornemisza Holdings Inc. ("TBH"). In return, all claims asserted or encompassed in the three complaints would be dismissed and barred and the merger would be allowed to proceed.

Petitioners attempt to mislead the Court (Petition, pp. 8-9) by misrepresenting and obfuscating the provisions for class representation contained in the district court's order of August 2, 1976 (the "Order"), a copy of which accompanies this Brief as Appendix I. In fact, plaintiffs Brucker and Kaplan (*Brucker* action), as owners of Debentures, represented the Debenture Owner Class, together with plaintiff Weinberger (*Weinberger* action), who, as a Debenture seller, also represented the Debenture Seller Classes. Such combined representation was appropriate because plaintiffs in both the *Brucker* and *Weinberger* actions asserted claims on behalf of both present and former owners of Debentures and had done so in litigation pending for more than two years at the time of the settlement.

The Order directed the mailing and publication of a "Notice of Indian Head Inc. Class Actions, Proposed Settlement and Hearing" (the "Notice") and directed that a hearing be held on October 13, 1976 to consider whether the settlement should be approved under Rule 23(e) of the Federal Rules of Civil Procedure. Pursuant to the Order, the Notice was mailed to all class members who could be identified from Indian Head records and was also published on a nationwide basis. The Notice described the litigation and the terms of the settlement[1] and informed class members of their rights to obtain additional information and to request exclusion or appear and show cause at the hearing set for October 13, 1976 why the settlement should not be approved. A copy of the Notice is appended hereto as Appendix II.

On September 27, 1976, petitioners filed a notice of intention to appear together with numerous objections to the proposed settlement.[2] Petitioners vigorously opposed the proposed settlement as unfair to Debenture owners only. They filed a lengthy memorandum raising numerous arguments, most of which, except for those made in Point

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[1] The first amended complaint in *Brucker* had been mooted by withdrawal of the February 11 merger proposal. The second amended complaint prayed for a permanent injunction against any future merger between Indian Head and TBI or its affiliated companies. It was served on the defendants prior to the filing of the Settlement Agreement on July 20, 1976. An apparent delay in recording the filing of the second amended complaint on the court docket until July 26 seems to have led petitioners into the absurdity that the second amended complaint impeached the validity of the Settlement Agreement. *See* Petition, p. 9.

[2] Another Debenture owner represented by counsel for the petitioners submitted a request for exclusion and subsequently brought a separate action incorporating many of the claims in *Brucker* and in the petitioners' arguments as objectors to the settlement. That Debenture owner claims to own $5,000 principal amount of Debentures.

Three other persons owning an aggregate of $27,000 principal amount of Debentures also requested exclusion. None has commenced an action. Thus, four persons owning a total of $32,000 in Debentures requested exclusion, out of an aggregate outstanding principal amount on August 2, 1976 of $14,291,000.

III of the Petition (pp. 24-29), have now been abandoned. The principal arguments made in Points I and II, however, were not raised below. Petitioners did not challenge the absence of findings to support the preliminary class action determinations made in the Order, nor did they assert that Rule 23 violates the Constitution by requiring class members to opt out or become "involuntary plaintiffs" in a foreign jurisdiction.

After hearing petitioners' arguments on October 13, 1976, the district court continued the hearing on October 18, 1976 to permit petitioners to complete their presentation. All of the objections raised by petitioners were rejected in that court's detailed decision rendered on November 16, 1976 (A13-23).

A judgment and order approving the settlement was entered on November 18, 1976 (the "Judgment") (A42). The court confirmed the class action determinations and the definitions of each of the classes to which the Notice had been sent pursuant to the Order. Thereafter, petitioners filed motions to alter or amend the Judgment, for a "partial" stay pending appeal and to supplement the record, but did not assert that the court should have made specific findings in support of the class determinations (either in the Order or the Judgment) nor did they assert that the procedure authorized by Rule 23 violated due process by subjecting them to the jurisdiction of the district court. After a hearing on November 29, 1976, Judge Stewart denied each of the motions. Petitioners filed a notice of appeal from the Judgment the same day.

On November 30, 1976, in accordance with the Settlement Agreement and the Judgment, Indian Head was merged into TBH, and on December 2, 1976, TBI paid $12,100,000 into the Debenture Settlement Fund and $1,450,000 into the Warrant Settlement Fund pursuant to the Settlement Agreement. Notice of the merger and a letter of transmittal were sent to all Common Stock owners informing them of

their rights to receive $32 per share under the Settlement Agreement and Delaware law. Similar notices and letters of transmittal were sent to all Debenture and Warrant owners informing them of their rights to receive the benefits of the settlement.

Petitioners' appeal to the Court of Appeals for the Second Circuit was heard on May 2, 1977. That court affirmed the district court's judgment from the bench at the close of oral argument. An order of affirmance was entered the same day. Again, petitioners did not argue before the Court of Appeals that the district court had failed to make findings in support of the class determinations in the Order or that Rule 23 unconstitutionally expanded the district court's jurisdiction.

Subsequent events have rendered petitioners' case moot. In addition to the completed merger of Indian Head and TBH, which petitioners ask this Court to undo, substantially all of the payments to class members have been made. As of August 1, 1977, there had been submitted pursuant to the settlement $12,178,000 in principal amount of Debentures (out of $14,291,000 outstanding as of August 2, 1976) for payment of $851.65 per $1,000; 564,683 shares of Common Stock (out of 585,878 outstanding as of August 2, 1976) for payment of $32 per share; and 316,480 Warrants (out of 349,467 publicly outstanding as of August 2, 1976) for payment of $4.00 or $2.50 per Warrant, as appropriate. As of August 1, 1977, a total of $29,877,396.87 had been paid to class members in accordance with the settlement terms. Moreover, although the Settlement Agreement preserved the appraisal rights of Common Stock owners on the merger date, holders of only 132 shares requested appraisal, but none commenced an appraisal proceeding before the Delaware Court of Chancery.

ARGUMENT

This litigation involves only the question whether the district court properly exercised its discretion under Rule 23(e) of the Federal Rules of Civil Procedure to approve the settlement of two class actions[3] brought under Rule 23(a) and (b)(3), and no amount of acrobatic rhetoric can convert that issue into one worthy of consideration by this Court.

Rule 23(c) commands the district court to determine whether an action under Rule 23(b)(3) shall be maintained as a class action and to insure that identifiable class members receive individual notice of the pendency of the action, of their rights to appear and be heard or to request exclusion from the class, and that any judgment in the action will include all class members who do not request exclusion. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974). Rule 23(e) requires that the class members receive notice of a proposed settlement. In its August 2, 1976 Order, the district court directed that a combined Rule 23(c) and (e) notice be mailed to all owners and former owners of Indian Head Common Stock, Debentures and Warrants who were included within the classes. That was done.

Rule 23(e) also requires that the district court determine whether the settlement should be approved. Approval is committed to the discretion of the district court and may be granted only after the court has evaluated the strength of the plaintiff's claims and weighed them against the benefits to be derived from the settlement. *Newman* v. *Stein,* 464

[3] Since petitioners could not and do not challenge the merger or the settlement insofar as either affects the class of Warrant owners, they do not address the propriety of settling the *Shamrock* action. Nor do they make any claim on behalf of the class of Common Stock owners (represented in *Brucker* and *Shamrock*) or on behalf of the classes of former Debenture owners (represented in *Brucker* and *Weinberger*). Nevertheless, were petitioners to obtain the relief they seek, the effect would be rescission of the entire settlement to the detriment of the Indian Head securities owners and former owners in those classes.

F.2d 689 (2d Cir.), *cert. denied,* 409 U.S. 1039 (1972); *West Virginia* v. *Chas. Pfizer & Co.,* 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971); *City of Detroit* v. *Grinnell Corporation,* 495 F.2d 448 (2d Cir. 1974); *Ace Heating & Plumbing Company* v. *Crane Company,* 453 F.2d 30 (3d Cir. 1971). The district court's thorough decision after a full hearing (A1-23) easily met that standard,[4] as the Court of Appeals for the Second Circuit confirmed by affirming the decision below, from the bench, without opinion.

Only four Debenture owners requested exclusion.[5] Only petitioners served objections. They fully briefed their arguments and reiterated them in hearings before the district court on October 13 and 18, 1976. In short, this settlement complied with all of the procedural and substantive requirements of due process and Rule 23. *See Hansberry* v. *Lee,* 311 U.S. 32 (1940); *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555 (2d Cir. 1968). *Cf. Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

There is no basis for review by this Court.

I.

There is No Conflict Among the Circuit Courts of Appeals.

A. Express findings with respect to the class action criteria of Rule 23(a) and (b) are not required for approval of a settlement under Rule 23(e).

Petitioners argue in this Court, *for the first time* in this litigation, that the August 2, 1976 Order (Appendix I hereto)

[4] As the district court noted (A8), the decision to settle this litigation was based chiefly on the potentially adverse precedents established in *Marshel* v. *AFW Fabric Corp.,* 533 F.2d 1277 (2d Cir. 1976), and *Green* v. *Santa Fe Industries, Inc.,* 533 F.2d 1283 (2d Cir. 1976). This Court vacated the decision in *Marshel* as moot, 429 U.S. 881 (1976), and resoundingly reversed *Green,* .. U.S. ..., 51 L. Ed. 2d 480 (Mar. 23, 1977). In March 1976, however, such an outcome could hardly have been described as certain, even if TBI's business decisions concerning the merger could have been held in abeyance for a year.

[5] Those four owned only $32,000 in principal amount of Debentures. See footnote 2, *supra.*

did not contain specific findings that the classes certified by the district court met the criteria of Rule 23(a) and (b). Petition, pp. 8, 16. Their failure to raise that argument below is sufficient ground for the Court to disregard it. *Brown* v. *United States,* 411 U.S. 223, 230 n.4 (1973); *Lawn* v. *United States,* 355 U.S. 339, 362 n.16 (1958); *California* v. *Taylor,* 353 U.S. 553, 557 n.2 (1957).

The supposed conflict of decisions among the Circuits raised by petitioners is a frivolous concoction. Petitioners claim to discern a conflict between the decisions of the Third and Ninth Circuits on the necessity for findings with respect to a class determination and, citing only a district court decision, claim that the Second Circuit agrees with the Third that such findings are not required. Petition, pp. 13-14. Whether the Third and Ninth Circuits are in conflict is not a matter for resolution in this case. The only relevant conflict would be one between the Second and Ninth Circuits, but, because the issue now raised by petitioners was not presented below, the Second Circuit's affirmance here cannot be taken as a statement of opinion either for or against requiring express findings with respect to class certification under Rule 23(a) and (b). Consequently, petitioners have not presented any evidence of a conflict between the Second and Ninth Circuits. Moreover, even if one credits petitioners' unfounded assumption that the Second Circuit "approved" the absence of such findings in the present case, the supposed conflict with the Ninth Circuit evaporates upon analysis of the applicable decisions.

Petitioners contend that *Price* v. *Lucky Stores, Inc.,* 501 F.2d 1177 (9th Cir. 1974), mandates formal findings of fact in support of every class action determination. In fact, the Ninth Circuit first held that an order *denying* class action status was appealable under 28 U.S.C. § 1292(a)(1) when the complaint sought broad injunctive relief against the defendants. 501 F.2d at 1179. Then, referring to the Tenth Circuit decision in *Wilcox* v. *Commerce Bank,* 474 F.2d 336, 345 (10th Cir. 1973), the court held that a "bare record of complaint, answer and motion to dismiss" was insufficient

to permit review on appeal, and that an "adequate record" and findings "keyed" to the requirements of Rule 23 were necessary.[6] 501 F.2d at 1179. *Accord, Clark* v. *Watchie,* 513 F.2d 994 (9th Cir.), *cert. denied,* 423 U.S. 841 (1975).

Price is simply inapposite. The Order did not deny certification of the classes; it allowed definition of the classes for purposes of settlement. Both the Second and Ninth Circuits agree that in a settlement context it is unnecessary to make specific findings to show the existence of class action prerequisites under Rule 23(a) and (b); rather, the Court must make adequate findings under Rule 23(e) to demonstrate why the settlement should be approved.[7]

In *Mandujano* v. *Basic Vegetable Products, Inc.,* 541 F.2d 832, 835-36 (9th Cir. 1976), which was overlooked or ignored by petitioners, the Ninth Circuit did not question the district court's approval of classes defined for settlement purposes,[8] holding only that the district court must "review carefully" and give a "reasoned response" to objections raised to the settlement before it can approve a proposed

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[6] Rule 23(b) permits a class action to be maintained if the prerequisites of Rule 23(a) are satisfied and if

> "(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . ."

Fed. R. Civ. Proc. 23(b), 28 U.S.C. The Rule then sets out various matters pertinent to the "findings". *Id.*

[7] Rule 23(e) provides:

> "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

[8] In addition to their argument about findings, petitioners also challenge the district court's approval of classes certified for settlement purposes and cite, among other authorities, *City of Detroit* v. *Grinnell Corporation,* 495 F.2d 448 (2d Cir. 1974). Petition, pp. 17-18. *Grinnell* is clear authority *contra* petitioners' argument and was relied upon by the district court in approving the settlement classes (A14). See pp. 10-11 *infra.*

settlement pursuant to Rule 23(e). In particular, the notice to the classes required by Rule 23(e)

> "must indicate that a member of the class can object to the proposed settlement as well as to the manner in which the class is defined. Each objection so made must become a part of the record of the case. The trial court before approving a proposed settlement must review carefully these objections. Those determined to be substantial cannot be rejected without an opportunity being afforded the objector to be heard. To assure an adequate hearing the trial court should not hesitate to permit an attorney of the objector's choosing to appear at the hearing and to represent the objector [footnote omitted] ....
>
> "The hearing which an objection of substance makes necessary must be sufficient to enable the trial court to set forth on the record a reasoned response thereto. Such findings of fact and conclusions of law as may be necessary to support the response must also appear on the record [footnote omitted]." *Id.* at 835-36.

The Second Circuit has also determined that classes may be certified for purposes of settlement and that the determination of whether a class action should be maintained in a settlement context is committed to the discretion of the district court. In *City of Detroit* v. *Grinnell Corporation*, 495 F.2d 448 (2d Cir. 1974), the court reaffirmed the principle that appellate intervention in a Rule 23(e) settlement would occur only upon "a clear showing that the District Court has abused its discretion." *Id.* at 455. Specifically addressing the propriety of defining classes for purposes of settlement, the court found such a procedure proper when the settlement had not been negotiated at a "premature" stage in the dispute, when the class members had received "notice of a hearing and an opportunity to challenge the fairness of the proposed settlement" and when there had not been a contest among putative class

representatives for designation as class representative. *Id.* at 466. The district court in this litigation addressed those questions and determined that all of the *Grinnell* tests for approval of settlement classes had been satisfied (A13-14).

All of the procedures discussed in *Mandujano* and *Grinnell* were followed in this case.[9] Each of the petitioners' objections was considered by the district court, whose findings of fact and conclusions of law were set forth in its lengthy memorandum decision, in conformity with the requirements of Rule 52(a). The district court reviewed the events which gave rise to the litigation (A3-7), the claims asserted by each of the classes (A7, A8), the legal issues involved (A12) and the reasons why the Debenture classes were properly defined[10] and adequately represented (A14-17). Not only is there no conflict between the Circuits, but the requirements of Rule 23 as interpreted in the relevant decisions (those dealing with class action settlements) in both Circuits were adhered to by the district court.

B. The law of adequacy of representation in a class action settlement is clear under both Rule 23 and the Constitution.

Petitioners have misstated the facts concerning plaintiffs' representation of the Debenture classes. Plaintiffs Brucker and Kaplan (*Brucker* action) had vigorously pros-

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[9] Moreover, *Price* v. *Lucky Stores*, relied upon by petitioners, does not establish a contrary principle. *Price* requires findings so that a denial of class certification can adequately be reviewed on appeal; *Mandujano* requires a "reasoned response" to objections so that they can adequately be reviewed on appeal. Although *Price* does not apply in a settlement context, the preservation of an objector's right to appeal under *Mandujano* and *Grinnell* is in accord with the policy underlying *Price*.

[10] *Compare Kremens* v. *Bartley*, . . . U.S. . . ., 45 U.S.L.W. 4451 (May 16, 1977), where the district court ignored the difference in treatment accorded to various class members under state administrative regulations and certified a single class. Petitioners' reliance on that case and like cases (Petition, p. 16) is frankly mystifying.

ecuted their case for more than two years at the time settlement was achieved (p. 2 *supra* and A7-8). Absent members of the Debenture classes had no cause to complain (*see* footnote 2 *supra*), as the district court found in approving the settlement under Rule 23.

Nevertheless, petitioners raise a Constitutional challenge to the adequacy of representation of the Debenture owner class. Petition, pp. 15-18. The Court has refused to consider this proposition at least once before. *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974).

Where notice of the class action and of the terms of the proposed settlement is accompanied by notice of the right to opt-out of the designated classes, there is no infringement of due process even if adequacy of representation by the class representatives could be shown to be lacking. In the *Four Seasons* class action, the Tenth Circuit, upon considering a motion for relief from judgment on the ground of inadequate representation, concluded that:

> "[D]ue process was satisfied here when [movant] received the notice and order delineating the terms of the proposed settlement and informing [it] that it was a designated member of a class, that it had the opportunity to opt out or be represented by counsel, that it would be bound if it failed to opt out. In such a case, we conclude that *due process may be satisfied by notice alone* and that, where due process is thus satisfied, adequacy of representation need not be shown as a matter of constitutional necessity." 502 F.2d at 843 (emphasis supplied).

Of course, petitioners actually appeared in this litigation, filed objections and participated in hearings on the settlement. They cannot assert a violation of due process as to them, *Hansberry* v. *Lee*, 311 U.S. 32, 42-43 (1940), and they lack standing to claim violations of due process as to

the other class members, who chose to accept the benefits of the settlement and whose interests are therefore inimical to those asserted by petitioners. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Bailey* v. *Patterson*, 369 U.S. 31 (1962); *Tileston* v. *Ullman*, 318 U.S. 44 (1943).

This is clearly not a case where the "great gravity and delicacy" of the Constitutional question justifies review. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

II.

This Case Does Not Present Any Important Federal Question.

A. Rule 23 does not expand the jurisdiction of the federal district courts.

Petitioners assert that the notice and "opt-out" provisions of Rule 23(c) fail to comply with the requirements of the due process clause of the Fifth Amendment for assertion of jurisdiction *in personam* and also violate Rule 82 and the Rules Enabling Act, 28 U.S.C. § 2072 (1958). Petition, pp. 19, 24. Petitioners apparently believe that not only was *this* class action settlement improper, but that *any* such settlement is improper. Those issues, like petitioners' arguments with respect to findings, were not raised by petitioners in, or addressed by, the courts below. For the reasons set forth in Point IA above, the Court should not consider them now.

1. Due process is afforded.

As discussed under Point IB above, any Constitutional issue as to the due process adequacy of the opt-out procedure under Rule 23(c) was laid to rest in *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974). Petitioners' entire argument to the contrary is based only on the chain of precedent establishing that due process limits the power

of a court to compel a foreign defendant to stand trial. Petition, pp. 19-24. Petitioners' cases have nothing to do with a procedural mechanism allowing a plaintiff class member to benefit from an action litigated by his representatives.

2. There is no violation of Rule 82 or the Rules Enabling Act.

Petitioners' argument that Rule 23 improperly expands the jurisdiction of the federal courts in violation of Rule 82 and the Rules Enabling Act, 28 U.S.C. § 2072 (Supp. 1977), is novel only in the sense that, like many of petitioners' previous arguments, it was not raised below and should be disregarded. Even if considered, however, it does not raise any issue for decision.[11]

As the Court held in *Hanna* v. *Plumer,* 380 U.S. 460, 471 (1965), each Federal Rule carries with it the "prima facie judgment" of "the Advisory Committee, this Court, and Congress . . . that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions" (footnote omitted).

The Court has never invalidated one of the Federal Rules of Civil Procedure. In an unbroken line of decisions, this Court has rejected every attempt to invalidate a Federal Rule as in violation of the Enabling Act. *Hanna* v. *Plumer, supra; Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964); *Mississippi Publishing Corp.* v. *Murphree,* 326 U.S. 438 (1946); *Sibbach* v. *Wilson & Co.,* 312 U.S. 1 (1941).

Those decisions make plain that a Federal Rule is valid under the Enabling Act so long as it does not change the rules of decision by which the Court adjudicates the rights of the parties. *Mississippi Publishing Corp.* v. *Murphree, supra,* 326 U.S. at 446. This is so even though the Rule may have a substantial impact upon the litigants or the outcome of the litigation.

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[11] The Act provides that federal rules promulgated thereunder "shall not abridge, enlarge or modify any substantive right". 28 U.S.C. § 2072 (Supp. 1977).

In *Sibbach* v. *Wilson & Co., supra,* 312 U.S. at 14, the Court stated:

> "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."

In *Mississippi Publishing Corp.* v. *Murphree, supra,* 326 U.S. at 445-46 (1946), the Court authoritatively rejected broad arguments that would hamstring the courts and call into question many of the Federal Rules of Civil Procedure:

> "Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. Sibbach v. Wilson & Co., 312 U.S. 1, 11-14. The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for Northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to 'the manner and the means by which a right to recover . . . is enforced.' "

Under the foregoing decisions, Rule 23(c) is plainly within the Supreme Court's Enabling Act authority, since it in no way modifies rules of decision, and since it relates solely "to the manner and means by which a right to recover . . . is enforced."

Finally, the validity of Rule 23 was before the Court in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974). Both the

defendants and the American College of Trial Lawyers (as *amicus curiae*) argued that maintenance of that case as a class action violated the Enabling Act. The Court implicitly rejected that argument in vacating the Circuit Court's decision and allowing the case to proceed on behalf of any smaller subclass that plaintiff could afford to notify. The opinion, which focused directly upon the mandatory individual notice requirement of Rule 23(c)(2), observed that such notice is:

> "... an unambiguous requirement ... intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit." *Id.* at 176.

B. The Court should not review questions of contract interpretation.

Distilled, petitioners' third point is only that the lower courts failed to agree with petitioners' interpretation of the Indenture governing the rights of the Debenture owners. Petition, p. 26. Such a question is normally not one that the Court will consider on certiorari. *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). *See also Berenyi* v. *District Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *on reh'g*, 339 U.S. 605 (1950).

Even if the Court were to take jurisdiction, it would have to disregard the plain language of Section 5.06 of the Indenture, discussed in the district court's memorandum decision (A15-17), and it would have to overrule the clear logic of *Broenen* v. *Beaunit Corporation*, 440 F.2d 1244 (7th Cir. 1970), a virtually indistinguishable case upon which the district court relied.

Finally, as an apparent afterthought, petitioners attack the injunction against future suits by class members based upon the same matters as were raised in the complaints. Petition, pp. 27-28. This specious objection has been rejected by several district courts, *e.g.*, *Fox* v. *Glickman Corporation*, 253 F. Supp. 1005, 1013 (S.D.N.Y. 1966); *Cherner* v. *Transitron Electronic Corporation*, 221 F. Supp. 48, 53 (D. Mass. 1963), and should not occupy the Court. Petitioners' contention (Petition, p. 28) that the injunction bars generally a suit to enforce a Debenture owner's rights under the Indenture, as distinguished from a suit to relitigate the specific claims encompassed in the settlement of this litigation, is nearly as foolish as their hyperbolic predictions of doom for the convertible debenture owners of the world.

III.

This Case is Moot.

Although petitioners continue their lonely challenge to the settlement of these class actions, nearly all other class members have accepted the benefits. Over $29,000,000 has been paid out to class members, and about 90% of petitioners' fellow Debenture owners have exchanged their Debentures for cash. The first anniversary of the merger between Indian Head and Thyssen-Bornemisza Holdings, Inc. is approaching. Even were it warranted, granting petitioners' demands that the Judgment be vacated and the Debenture owners returned to the *status quo ante* would be a sterile exercise in absurdity. Where events have occurred, in the absence of an injunction, which effectively preclude restoration of the prior circumstances, this Court has refused to consider granting the relief sought by the writ. *Mills* v. *Green*, 159 U.S. 651, 653 (1895). *See also Securities and Exchange Commission* v. *Medical Committee For Human Rights*, 404 U.S. 403 (1972); *Alton* v. *Alton*, 347 U.S. 610 (1954).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT F. DOBBIN,
ROBERT S. BLANC, III
53 Wall Street
New York, New York 10005

ROBERT ROSENMAN
One Chase Manhattan Plaza
New York, New York 10005

RICHARD J. CUTLER
1211 Avenue of the Americas
New York, New York 10036

Attorneys for Defendants-Respondents

Of Counsel:

SHEARMAN & STERLING
53 Wall Street
New York, New York 10005

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005

September 19, 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER and DANIEL R. KAPLAN, as Trustees under the Trust Agreement dated November 15, 1968, made by WILTRUD E. GADBOYS, as Grantor, CECIL G. HUSKEY, W. T. STRATTON and NORTE & Co., a partnership composed of JOSEPH C. GALDI and RITA D. GALDI, *Plaintiffs,* —*against*— THYSSEN-BORNEMISZA EUROPE N.V., THYSSEN-BORNEMISZA, INC., THYSSEN-BORNEMISZA HOLDINGS, INC., MARINE MIDLAND BANK, INDIAN HEAD INC., JAMES G. FERGUSON, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALISTER, JOHN E. O'SULLIVAN, RICHARD J. POWERS, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, HERBERT E. BACHRACH, GERARD B. HUISKAMP, WHITE, WELD & Co. INCORPORATED, L. EMERY KATZENBACH, H. H. THYSSEN-BORNEMISZA, R. L. GENILLARD and CHEMICAL BANK, *Defendants.*	74 Civ. 5755 (CES)
WILLIAM B. WEINBERGER, *Plaintiff,* —*against*— RICHARD J. POWERS, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALISTER, JOHN E. O'SULLIVAN, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, JAMES G. FERGUSON, THYSSEN-BORNEMISZA, INC. and INDIAN HEAD INC., *Defendants.*	75 Civ. 229 (CES)
SHAMROCK CORPORATION, individually, and on behalf of all holders of Common Stock and Warrants of Indian Head Inc., similarly situated, *Plaintiffs,* —*against*— INDIAN HEAD INC.; THYSSEN-BORNEMISZA GROUP N.V.; THYSSEN-BORNEMISZA, INC.; WHITE, WELD & Co. INCORPORATED; RICHARD J. POWERS; JAMES E. ROBISON, HERBERT E. BACHRACH; GERARD B. HUISKAMP; L. EMERY KATZENBACH; MARSHALL F. SMITH; H. H. THYSSEN-BORNEMISZA; R. L. GENILLARD; THYSSEN-BORNEMISZA HOLDINGS, INC. and CHEMICAL BANK, *Defendants.*	FILE: 75 Civ. 1736 (CES)

ORDER

Upon the Affidavit of William Klein II, sworn to on the 20th day of July, 1976, and upon the Stipulation and Agree-

ment of Settlement dated July 20, 1976 as amended by the Amendment to Stipulation and Agreement of Settlement dated July 28, 1976 ("Agreement"), annexed hereto, which has been executed by counsel for the parties in the above-captioned actions, and upon the consent of counsel for the parties in the above-captioned actions, and upon all of the prior proceedings herein;

Now, THEREFORE, it is hereby

ORDERED, that the above-captioned actions shall be maintained as class actions, for purposes of settlement only, on behalf of the following classes:

(i) *Common Stock Class.* All owners, beneficially or of record, of $1.00 par value common stock ("Common Stock") of Indian Head as of the date this Order is entered who continue to own such Common Stock on the date of the merger (the "Merger Date") to be effected as provided in the annexed Agreement;

(ii) *Debenture Owner Class.* All owners, beneficially or of record, of 5½% Convertible Subordinated Debentures due April 15, 1993 of Indian Head ("Debentures") as of the date this Order is entered who continue to own such Debentures on the Merger Date;

(iii) *Debenture Seller Classes.* Former owners, beneficially or of record, of Debentures, as follows:

Debenture Seller Class A. All such owners on September 27, 1973 who sold such Debentures between September 27, 1973 and July 1, 1974, inclusive;

Debenture Seller Class B. All such owners on July 2, 1974 who sold such Debentures between July 12, 1974 and the date this Order is entered, inclusive;

(iv) *Warrant Owner Classes.* Owners, beneficially or of record, of warrants issued pursuant to the Warrant Agreement dated as of May 15, 1965 between

Indian Head and Chemical Bank ("Warrants"), as follows:

Warrant Owner Class A. All such owners as of the date this Order is entered who continue to own such Warrants on the Merger Date;

Warrant Owner Class B. All members of Warrant Owner Class A who were owners of Warrants on July 2, 1974;

(v) *Warrant Seller Classes.* Former owners, beneficially or of record, of Warrants, as follows:

Warrant Seller Class A. All such owners on July 2, 1974 who sold such Warrants between July 12, 1974 and the date this Order is entered, inclusive;

Warrant Seller Class B. All such owners who sold such warrants between August 1, 1973 and July 1, 1974, inclusive; and it is further

ORDERED, that Edward Brucker and Daniel R. Kaplan are designated as representatives of all the foregoing classes; that William B. Weinberger is designated as representative of the Debenture Owner Class and Debenture Seller Classes; Cecil G. Huskey, W. T. Stratton and Shamrock Corporation are designated as representatives of the Warrant Owner Classes and Warrant Seller Classes; and that Norte & Co., a partnership composed of Joseph C. Galdi and Rita D. Galdi, is designated as representative of the Common Stock Class; and it is further

ORDERED, that Austrian, Lance & Stewart, P.C. is designated lead counsel for all classes designated herein, Weinstein & Levinson is designated co-counsel for the Debenture Owner Class and Debenture Seller Classes designated herein and Wolf, Haldenstein, Adler, Freeman, Herz & Frank as co-counsel for the Warrant Owner Classes and Warrant Seller Classes designated herein; and it is further

ORDERED, that a hearing shall be held on the 13th day of October, 1976, at 4:00 P.M. in Room 2703 in the United States Courthouse, Foley Square, New York, New York 10007, and continuing thereafter on such adjourned date or dates as the Court may direct, to determine whether the terms of the annexed Agreement, and the merger therein provided, are fair, reasonable and adequate, whether they should be approved by the Court and to schedule a subsequent hearing to be held without further notice to determine whether the fees and allowances as may be applied for by plaintiffs' counsel in the above-captioned actions should be approved; and it is further

ORDERED, that within ten (10) business days after entry of this Order, Thyssen-Bornemisza, Inc. ("TBI") shall mail or cause to be mailed, at its expense, by United States mail, postage prepaid, to each and every member of the classes designated above whose name and address appears on the records of Indian Head, at such address, a Notice of Settlement Hearing ("Notice") substantially in the form of Exhibit "B" to the annexed Agreement, and in the case of each and every member of the Debenture Seller Classes and the Warrant Seller Class A, TBI shall, in addition, mail or cause to be mailed to each Proofs of Claim substantially in the form of Exhibit "C" to the annexed Agreement, and that within five (5) days after such mailings TBI shall cause to be filed with the Clerk of the Court an affidavit showing that such mailings have been made as directed herein; and it is further

ORDERED, that TBI shall cause to be published at its expense the Notice susbtantially in the form of Exhibit "B" in The New York Times and The Wall Street Journal (Eastern, Midwest, Southwest and Pacific Coast editions) in columns no smaller than one-eighth of a page on one (1) business day in each of two (2) successive weeks commencing within ten (10) business days after the date of this Order, and further requiring that within five (5) days after

the last of such publications TBI shall cause to be filed with the Clerk of the Court an affidavit of such publication; and it is further

ORDERED, that all brokerage firms and other financial institutions which are or were or whose nominees are or were the record owners of Common Stock, Debentures or Warrants, shall transmit any Notices received to all persons who by their records are shown to be beneficial owners or former owners of Common Stock, Debentures or Warrants who are members of any class designated herein and any Proofs of Claim received to all such former beneficial owners who are members of the Debenture Seller Classes or Warrant Seller Class A designated herein, shall request such additional Notices and Proofs of Claim as are necessary to comply with this Order, and shall be reimbursed by TBI, upon written request, for the reasonable and necessary expenses of complying with this Order; and it is further

ORDERED, that the foregoing methods of notice are the best practicable under the circumstances and that the form of Notice in Exhibit "B" fully and fairly describes the terms of the settlement and merger provided for in the annexed Agreement; and it is further

ORDERED, that plaintiffs shall, with the cooperation of the Clerk of the Court, lease a numbered post office box of adequate size in the City of New York, in the name of the Clerk of the Court, for the purpose of receiving Proofs of Claim, requests for exclusion and any other communications from class members, and that all notices to class members shall bear the designation of said post office box as the return address; and it is further

ORDERED, that in order to assert a claim to the settlement funds provided for in the annexed Agreement, a member of the Debenture Seller Classes or the Warrant Seller Class A

must mail to the Clerk of the Court, at the post office box provided for herein, a Proof of Claim by November 24, 1976, and that failure to mail a Proof of Claim by such date shall terminate any rights which he may have to participate in the distribution of the settlement funds provided for in the annexed Agreement and to assert any claim against any of the defendants arising from or relating to the subject matter of any of the pleadings in the above-captioned actions, unless he has filed a written request for exclusion, as provided herein, from the class of which he would otherwise be a member; and it is further

ORDERED, that plaintiffs shall deliver to Shearman & Sterling, attorneys for certain defendants, (1) copies of communications received at the post office box provided for herein or by plaintiffs' counsel from members of the class within three (3) days of any request therefor, and (2) promptly, copies of replies to any inquiries or communications regarding the Notice; and it is further

ORDERED, that any person who desires to be excluded from any class shall mail to the Clerk of the Court, at the post office box provided for herein, a written request for exclusion, postmarked not later than fifteen (15) days prior to the hearing set herein, stating

(i) His or her name, address and telephone number;

(ii) The number of shares of Common Stock, principal amount of Debentures and number of Warrants he or she purchased and sold; and

(iii) The number of shares of Common Stock, principal amount of Debentures and number of Warrants he or she continues to own; and

that any person who so mails such a written request for exclusion shall not share in the benefits of the settlement and will not be bound by any judgment entered thereon and that failure to submit a written request for exclusion by the prescribed date will result in such class member's being bound by the terms of any judgment or order in the above-captioned actions, including a judgment approving the settlement and the merger as provided in the annexed Agreement; and it is further

ORDERED, that no person, other than a class member who does not request exclusion in the manner provided for above, may object to the approval of the settlement provided for in the annexed Agreement, and that any class member who objects to the approval of the settlement provided for in the annexed Agreement may appear at the hearing personally or through counsel of his or her choice and show cause, if any he or she has, why the settlement and merger proposed in the annexed Agreement should not be approved as fair, reasonable and adequate, and why a judgment should not be entered thereon, provided, however, that no such class member will be heard and no brief or other papers, if any, will be received or considered by the Court, except as the Court may in its discretion direct, unless a notice of intention to appear and a statement of the position to be asserted and the grounds therefor, together with satisfactory proof of class membership, and any briefs or other papers which such class member may choose to submit, are filed with the Clerk of the Court and served upon Austrian, Lance & Stewart, P.C., 630 Fifth Avenue, Rockefeller Center, New York, N.Y. 10020, and upon Shearman & Sterling, 53 Wall Street, New York, N.Y. 10005, not later than fifteen (15) days prior to the hearing set herein; and it is further

ORDERED, that no class member shall be entitled in any way to contest the approval of the settlement and merger provided for in the annexed Agreement unless he or she has served and filed the papers specified above, and that any class member who fails to object in the manner prescribed shall be deemed to have waived, and shall be foreclosed forever from raising, any objections; and it is further

ORDERED, that the institution, maintenance, or prosecution of any and all actions, suits, claims, arbitrations or any other proceedings by any person arising out of or relating to the subject matter of any of the pleadings in the above-captioned actions, the terms of the annexed Agreement or the merger provided for therein shall be stayed and enjoined in any court other than before the Honorable Charles E. Stewart, Jr. of the United States District Court for the Southern District of New York, pending entry of a judgment and order determining whether the settlement and merger as provided for in the annexed Agreement are fair, reasonable and adequate; and it is further

ORDERED, that the Court hereby retains jurisdiction to alter or amend this Order pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Dated: New York, New York
Aug. 2, 1976

/s/ CHARLES E. STEWART JR.
U.S.D.J.
MG

Appendix II

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER et al., Plaintiffs, —against— THYSSEN-BORNEMISZA EUROPE N. V. et al., Defendants.	74 Civ. 5755 (CES)
WILLIAM B. WEINBERGER, Plaintiff, —against— RICHARD J. POWERS et al., Defendants.	75 Civ. 229 (CES)
SHAMROCK CORPORATION et al., Plaintiffs, —against— INDIAN HEAD INC. et al., Defendants.	75 Civ. 1736 (CES)

NOTICE OF INDIAN HEAD INC. CLASS ACTIONS, PROPOSED SETTLEMENT AND HEARING

To: ALL PRESENT OWNERS OF INDIAN HEAD COMMON STOCK, CONVERTIBLE DEBENTURES AND WARRANTS

ALL OWNERS OF INDIAN HEAD DEBENTURES ON SEPTEMBER 27, 1973 WHO SOLD THEM THEREAFTER

ALL OWNERS OF INDIAN HEAD DEBENTURES ON JULY 2, 1974 WHO SOLD THEM THEREAFTER

ALL OWNERS OF INDIAN HEAD WARRANTS ON JULY 2, 1974 WHO CONTINUE TO OWN THEM

ALL OWNERS OF INDIAN HEAD WARRANTS ON JULY 2, 1974 WHO SOLD THEM THEREAFTER

ALL OWNERS OF INDIAN HEAD WARRANTS WHO SOLD THEM BETWEEN AUGUST 1, 1973 AND JULY 1, 1974.

A PROPOSED SETTLEMENT HAS BEEN REACHED IN THE ABOVE-CAPTIONED ACTIONS. THIS NOTICE SETS OUT THE PROCEDURE BY WHICH ALL PRESENT OWNERS OF INDIAN HEAD INC. COMMON STOCK, CONVERTIBLE DEBENTURES OR WARRANTS, AND CERTAIN FORMER OWNERS OF INDIAN HEAD CONVERTIBLE DEBENTURES OR WARRANTS, MAY SHARE IN THE SETTLEMENT PROCEEDS IF THE PROPOSED SETTLEMENT IS APPROVED BY THE COURT.

1. PLEASE TAKE NOTICE THAT, pursuant to Rule 23 of the Federal Rules of Civil Procedure and pursuant to an order of the United States District Court for the Southern District of New York, dated August 2, 1976:

A. *Settlement Hearing.* A hearing will be held in the above-captioned actions in Room 2703, United States Courthouse, Foley Square, New York, New York, at 4 P.M. on October 13, 1976 ("Settlement Hearing") on an application by the parties to these actions (i) to determine the fairness, reasonableness and adequacy of the proposed settlement and whether these actions should be dismissed on the merits and with prejudice as to all defendants, and (ii) if the proposed settlement be approved, to schedule a hearing to determine allowable fees, disbursements and expenses, as hereinafter more particularly described. The Settlement Hearing may be adjourned by the Court without further notice other than an announcement in court on the above date.

B. *Class Certification.* The above-captioned actions have been ordered to be maintained as class actions for purposes of this settlement on behalf of *all Owners, beneficially or of record, of the following Indian Head securities, during the periods specified:*

COMMON STOCK CLASS. *All Owners of Indian Head Common Stock on August 2, 1976 who have con-*

*tinuously owned such shares to and including the date of the proposed merger of Indian Head into Thyssen-Bornemisza Holdings, Inc. which will take place if the proposed settlement is approved (the "*MERGER DATE*").*

DEBENTURE OWNER CLASS. *All Owners of Indian Head 5½% Convertible Subordinated Debentures due April 15, 1993 ("Debentures") on August 2, 1976 who have continuously owned them to and including the* MERGER DATE.

DEBENTURE SELLER CLASS A. *All Owners of Debentures on September 27, 1973 who sold such Debentures between September 27, 1973 and July 1, 1974.*

DEBENTURE SELLER CLASS B. *All Owners of Debentures on July 2, 1974 who sold such Debentures between July 12, 1974 and August 2, 1976.*

WARRANT OWNER CLASS A. *All Owners of Indian Head Warrants issued pursuant to the Warrant Agreement dated as of May 15, 1965 between Indian Head and Chemical Bank ("Warrants") on August 2, 1976 who have continuously owned them to and including the* MERGER DATE.

WARRANT OWNER CLASS B. *All Owners of Warrants on July 2, 1974 who have held them continuously to and including the* MERGER DATE.

WARRANT SELLER CLASS A. *All Owners of Warrants on July 2, 1974 who sold such Warrants between July 12, 1974 and August 2, 1976.*

WARRANT SELLER CLASS B. *All Owners of warrants who sold such Warrants between August 1, 1973 and July 1, 1974.*

WHAT YOU WILL RECEIVE UNDER THE PROPOSED SETTLEMENT AND HOW TO OBTAIN IT.

Proposed Cash Settlement Payments.

2. Under the proposed settlement, class members who accept the settlement and who comply with the procedures summarized below will receive the following cash payments:

COMMON STOCK CLASS [585,547 shares publicly outstanding]—*$32 per share:*

To be paid upon the Merger and submission of your Stock Certificates together with a properly filled out Transmittal Letter which will be sent to owners of record upon the Merger.

DEBENTURE OWNER CLASS [14,293 Debentures (face value $1,000) outstanding]—*$844.16 for each Debenture:*

To be paid after the Merger and upon submission of your Debenture Certificates together with a properly filled out Transmittal Letter, which will be sent to owners of record upon the Merger, together with any required documentation.

DEBENTURE SELLER CLASS A—If you can establish that you sold any Debentures for *less than $650:*

You will be entitled to be paid the difference between $650 and your sales price (before deducting expenses of sale), *but no more than $50 per Debenture,* provided that you fill out a green Proof of Claim; attach to the Proof of Claim brokerage confirmations, monthly statements or other written proof of ownership and sales price and mail or file it as provided in Paragraph 17 below. Any objection by defendants to your Proof of Claim will be submitted to the Court for final determination. After the Merger, you will receive payment up to $50 per Debenture, provided the Court has not sustained any objection which may have been made to your Proof of Claim.

DEBENTURE SELLER CLASS B—If you can establish that you sold any Debentures for *less than $701.*

You will be entitled to be paid the difference between $701 and your sales price (before deducting expenses of sale), *but no more than $100 per Debenture,* provided that you fill out a yellow Proof of claim, attach to the Proof of Claim brokerage confirmations, monthly statements or other written proof of ownership and sales price and mail or file it as provided in Paragraph 17 below. Any objection by defendants to your Proof of Claim will be submitted to the Court for final determination. After the Merger, you will receive the payment of up to $100 per Debenture, provided the Court has not sustained any objection which may have been made to your Proof of Claim.

WARRANT OWNER CLASS A [349,467 Warrants publicly outstanding]—*$3.50 per Warrant:*

To be paid after the Merger and upon submission of your Warrant Certificates together with a properly filled out Transmittal Letter, which will be sent to owners of record upon the Merger, together with any required documentation.

WARRANT OWNER CLASS B— *$4 per Warrant:*

To be paid after the Merger and upon submission of your Warrant Certificates together with a properly filled out Transmittal Letter which will be sent to owners of record upon the Merger, and written proof of the dates of purchase, together with any required documentation.

WARRANT SELLER CLASS A—*$1.50 per Warrant:*

To be paid after the Merger, provided that you fill out a blue Proof of Claim, attach to the Proof of Claim brokerage confirmations, monthly statements

or other written proof of ownership and sale and mail or file it as provided in Paragraph 17 below. Any objection by defendants to your Proof of Claim will be submitted to the Court for final determination. After the Merger, you will receive the payment of $1.50 per Warrant, provided the Court has not sustained any objections which may have been made to your Proof of Claim.

WARRANT SELLER CLASS B:

The Settlement makes no provision for payment to members of this Class because plaintiffs' counsel are of the opinion that members of this Class can neither establish liability of the defendants, nor damages. The affidavit of plaintiffs' counsel dated July 20, 1976, on file in the Court and available for inspection, gives a more detailed explanation. Members of this Class will be bound by the proposed settlement, and thus receive no payment thereunder, unless they elect to be excluded as hereinafter provided.

Effect of Accepting Settlement.

3. By submitting a Proof of Claim or Transmittal Letter as described above, you will submit your claims to the jurisdiction of the Court and release the defendants from all claims which were or could have been asserted in these actions. If you are a class member and neither exclude yourself from the settlement in the manner prescribed below nor file a timely and proper Proof of Claim or Transmittal Letter as provided herein, you will be forever barred from recovery from the defendants with respect to all claims which are or could have been asserted in these actions.

Proposed Merger.

4. Upon entry of a Judgment and Order of the Court approving this settlement upon the terms and conditions of

the Settlement Agreement, THYSSEN-BORNEMISZA, INC. ("TBI") shall cause INDIAN HEAD to be merged into THYSSEN-BORNEMISZA HOLDINGS, INC., a subsidiary which will be formed by TBI, pursuant to §253 of the Delaware Corporation Law (the "MERGER"), paying thereafter $32 for each share of Common Stock of INDIAN HEAD issued and outstanding on the MERGER DATE to holders of Common Stock.

Escrow Payments.

5. After the MERGER DATE, TBI will pay $12,100,000 into a Debenture Settlement Fund to be administered by MARINE MIDLAND BANK and pay $1,450,000 into a Warrant Settlement Fund to be administered by CHEMICAL BANK, and will make such additional payments to such Funds as are necessary to effectuate the terms of the proposed settlement. The Debenture and Warrant class members will be paid by MARINE MIDLAND BANK and CHEMICAL BANK, respectively, the sums to which they are entitled from such Settlement Funds as promptly as practicable after the approval of the settlement and receipt of Proofs of Claim and Transmittal Letters.

Settlement Agreement and Court Papers.

6. The full and complete terms of the proposed settlement are contained in a Stipulation and Agreement of Settlement, as amended ("Settlement Agreement"). The Settlement Agreement, together with the pleadings and all other papers, including the Order of the Court certifying these actions as Class Actions and directing the Settlement Hearing herein described, are on file with the Clerk of the United States District Court for the Southern District of New York, Foley Square, New York, New York, and are available for inspection at any time from 9:30 A.M. to 5:00 P.M., Monday through Friday, holidays excepted, at the Office of the Clerk. Any questions you may have with

respect to this Notice and the Settlement Agreement should be raised with your attorney or advisor, or directed to lead counsel for plaintiffs, WILLIAM KLEIN II, ESQ., AUSTRIAN, LANCE & STEWART, P.C., 630 Fifth Avenue, New York, New York 10020 (Tel. No. [212] 489-9500), and not with the Court. In order to determine the tax consequences, if any, of the money received pursuant to the settlement, you should consider consulting your own accountant or attorney.

Attorney Fees:

7. If the proposed settlement is approved by the Court, applications will be made by AUSTRIAN, LANCE & STEWART, P.C., lead counsel, WEINSTEIN & LEVINSON, co-counsel for the Debenture Owner Class and Debenture Seller Classes, and WOLF, HALDENSTEIN, ADLER, FREEMAN, HERZ & FRANK, co-counsel for the Warrant Owner and Warrant Seller Classes, for their fees and expenses. TBI has agreed to pay the reasonable fees and expenses of counsel for plaintiffs in the above-captioned actions in such amounts as are awarded by the Court, but not more than an aggregate amount of $600,000.

The Settlement Hearing.

8. If you are satisfied with the proposed settlement, you need not appear at the Settlement Hearing, and your interests will be represented by plaintiffs' counsel. Any person who establishes membership in any class described herein may appear at the Settlement Hearing and show cause, if such member has any, why the proposed settlement should not be approved and the action dismissed. No person shall be heard at the Settlement Hearing unless notice of intention to appear and grounds for objection in writing, together with any supporting papers and briefs which such class member may choose to submit, are filed with the Court on

or before September 28, 1976, showing due proof of service on both of the following:

Austrian, Lance & Stewart, P.C.
630 Fifth Avenue
New York, New York 10020

Lead Counsel for All Classes

Shearman & Sterling
53 Wall Street
New York, New York 10005
Attorneys for Certain Defendants

Any class member who does not make objection in the manner provided herein shall be deemed to have waived such objection and shall be forever foreclosed from making any objection (by appeal or otherwise) to the proposed settlement. The filing of an objection shall not extend the time within which a class member may file an acceptable Proof of Claim or request exclusion from a class nor exclude the objector from any judgment entered in these actions.

DESCRIPTION OF THE LITIGATION

Original Brucker Complaint.

9. On December 31, 1974 the Brucker plaintiffs on behalf of themselves and other owners of Indian Head Convertible Debentures commenced an action against a number of defendants, including INDIAN HEAD, THYSSEN-BORNEMISZA EUROPE N.V. ("TBE"), TBI and certain officers and directors of those companies. This original Brucker Complaint alleged that no notice was sent to the Debenture owners of the Tender Offers made by TBE on September 27, 1973 and July 12, 1974, as a result of which TBI acquired 90.6% of Indian Head Common Stock; the Debentures and Common Stock were delisted from the New York Stock Exchange; the Debenture owners were thereby deprived of the opportunity to convert into Common Stock and receive

$701 for each $1,000 Debenture; and after TBE acquired control and the Debentures and Common Stock were delisted, the market price for the Debentures had fallen below $500. (The above-entitled *Weinberger* action, commenced in January 1975, made similar complaints on behalf of Debenture owners, and the above-entitled *Shamrock* action, commenced in April, 1975 on behalf of Indian Head Warrant owners, alleged that the terms of the Tender Offers were unfair.)

Brucker Amended Complaint.

10. On February 20, 1976 the Brucker plaintiffs filed an Amended Complaint on behalf of all Indian Head Common Stock and Warrant owners, as well as Debenture owners, alleging that TBE had proposed on February 12, 1976 to merge Indian Head into a TBE subsidiary, on unfair and unlawful terms: $779 for the Debentures, which were then redeemable at $1,033; $30 for the Common Stock; and the Warrants, which were exercisable at the same $30 price as was being offered the Common stock, would receive nothing. It further alleged that the merger was a redemption of the Debentures at $1,033; the failure to notify the Debenture owners of the tenders created a default causing the $1,000 principal to be due and payable; the Merger had no business purpose; and TBE had used its majority control of Indian Head to dictate unfair prices to the members of all classes. (An Amended Complaint filed in the *Shamrock* action on March 4, 1976, made similar allegations on behalf of Warrant holders and Common Stock holders.) A preliminary injunction was requested to stop the merger, and on the return date of the preliminary injunction hearing the proposed merger was withdrawn ("Withdrawn Merger Proposal").

Second Amended Complaint.

11. On July 20, 1976, the Brucker plaintiffs filed, in connection with the proposed settlement, a Second Amend-

ed Complaint which embodied the facts, circumstances and allegations contained in the various proceedings since the litigation commenced. The plaintiffs include two Warrant holders owning an aggregate of 9,100 Warrants, and an owner of 32 shares of Common Stock. In addition to the allegations in the prior complaints, it was alleged that both tender offers were made in violation of the rights of Warrant owners.

Defendants' Denial of Liability.

12. The defendants, while denying all liability on the charges made in the actions, maintaining their innocence of any wrongdoing, and relying upon the stipulation that the settlement shall not in any event be construed as or deemed to be evidence or an admission or concession on the part of the settling defendants or any of them, of any liability or wrongdoing whatsoever, consider it desirable that the actions be settled. Such settlement is desired to avoid further expense, to preserve and protect their business reputations, to dispose of burdensome and protracted litigation and to permit the merger of Indian Head into a subsidiary of TBI to proceed unhampered by expensive litigation and the distraction and diversion of its executive personnel; and they have accordingly agreed to the settlement on the terms stated in the Settlement Agreement.

Plaintiffs' Counsel's Recommendation of Settlement.

13. Plaintiffs, by their attorneys and experts, have made a thorough and detailed investigation of the facts, circumstances and transactions involved in this action, and have conducted an extensive investigation of the ten year-documentary record underlying the transactions involved in the above-captioned actions and of the financial, market and economic aspects thereof. After taking into account the likelihood that this litigation, if not settled now, will be protracted and extensive, involving uncertain questions of establishing liability and difficulties in es-

tablishing damages, the risks inherent in litigation and potential time-consuming appeals, counsel for the plaintiffs have concluded that it would be in the best interests of plaintiffs and the classes to settle the actions on the terms of the proposed settlement.

In counsel's opinion (and taking into account that the Debentures and Warrants expire in 1993 and 1990, respectively), the class members will receive as much on settlement, and possibly more, than they might be awarded in damages, after trial, assuming they could obtain a judgment on liability, which plaintiffs' counsel deems questionable. Thus, the Warrant owner on July 2, 1974 who continues as an owner on the Merger Date receives $4 compared to nothing in the Withdrawn Merger Proposal and approximately $4.50 in the market prior to the July 12, 1974 tender offer. $844.16 for the Debentures compares to the $1,000 face amount, the $701 requested in the original Brucker Complaint and $420—$480 in the market after the Debentures were delisted from the New York Stock Exchange in September 1974. $32 for the Common Stock is $5 more than the tender offers and $10 more than the market price before the 1974 tender offer. The market prices on February 11, 1976, the day before the Withdrawn Merger Proposal was announced, were: Warrants: $2; Common Stock: $24; and for a $1,000 Debenture, $600.

Purpose of Notice.

14. This Notice is being sent to you in the belief that you are an owner of Common Stock of Indian Head or that you are or were an owner of Debentures or Warrants and that your rights may be affected by these actions and the proceedings described in this Notice. This Notice is not an expression of any opinion by the Court as to the merits of any claim or defense in these actions, but is solely to inform you of the pendency of the actions and of the proposed settlement described herein, so that you may decide what steps you may wish to take in relation to these actions and the

proposed settlement. Former Owners of Indian Head Common Stock who tendered their shares in either of the two Tender Offers described above are not affected by nor a part of the proposed settlement and, therefore, are not being sent notice thereof.

SPECIAL NOTICE TO BROKERAGE FIRMS AND OTHER FINANCIAL INSTITUTIONS

15. All brokerage firms and other financial institutions which are or were or whose nominees are or were the record owners of Common Stock, Debentures or Warrants are directed, by Order of the Court, to transmit any Notices received to all persons who by their records are shown to be beneficial owners or former owners of Common Stock, Debentures or Warrants who are members of any class designated herein and any Proofs of Claim received to all such former beneficial owners who are members of the Debenture Seller Classes or Warrant Seller Class A, are further directed to request from the Clerk of the United States District Court for the Southern District of New York, P.O. Box 1046, New York, New York 10005, such additional Notices and Proofs of Claim as are necessary to comply with the Court's Order, and shall be reimbursed by TBI, upon written request, for the reasonable and necessary expenses of complying with the Court's Order described in this paragraph.

Settlement Conditions.

16. This proposed settlement is subject to and will not become effective until final approval by the District Court. TBI has the option to terminate the Settlement Agreement, if:

(a) Requests for exclusion from the settlement (see below) are returned by persons who, had they been members of the Common Stock Class and had not elected to be excluded therefrom, would have been en-

titled by reason of their Common Stock Class membership to more than $500,000 in aggregate amount under the terms of the Settlement Agreement or the Merger; or

(b) A judgment and order of the Court approving this proposed settlement upon the terms and conditions of the Settlement Agreement, including the Merger, is not entered within thirty (30) days following the conclusion of the Settlement Hearing; or

(c) The Merger is stayed or enjoined or cannot be effected for any reason.

PROOF OF CLAIM BY SELLERS OF DEBENTURES OR WARRANTS

Filing of Claims.

17. Proofs of Claim are available upon request by writing to the Clerk of the United States District Court, Southern District of New York, P.O. Box 1046, New York, N. Y. 10005. Members of Debenture Seller Class A should request a green Proof of Claim, members of Debenture Seller Class B should request a yellow Proof of Claim and members of Warrant Seller Class A should request a blue Proof of Claim. Each such Proof of Claim must be mailed either to the address designated therein or filed with the Court no later than November 24, 1976, accompanied by written evidence of your purchases and sales. Any class member who fails to mail a valid and timely request for exclusion and who fails to submit a Proof of Claim by such date shall be precluded from sharing in the distribution of the Settlement Funds, but will in all other respects be subject to the provisions of the Settlement Agreement and any judgment or orders entered pursuant thereto. A Proof of Claim shall be deemed submitted when posted if it has been properly filled out and signed, a postmark is indicated on the envelope, and it is mailed postage prepaid, addressed in accordance with the instructions given therein. (To be sure of a proper post-

mark, you should take the envelope to a Post Office window for hand stamping with a date).

Review of Claims.

18. Proofs of Claim and Transmittal Letters submitted by members of the various Debenture classes will be reviewed by Marine Midland Bank, and those submitted by members of the various Warrant classes will be reviewed by Chemical Bank. Any questions concerning the payment or nonpayment of any Proofs of Claim or Transmittal Letters will be referred to Austrian, Lance & Stewart, P.C., lead counsel for the classes, and Shearman & Sterling, counsel for certain defendants. Any questions unresolved by such counsel will be submitted to the Court for final determination. Payment to any class member who participates in an appeal of a judgment approving the proposed settlement will be withheld until the determination of such appeal.

Payment of Expenses.

19. TBI shall pay all costs and expenses incurred in connection with the administration and distribution of the respective Settlement Funds and processing Proofs of Claim and Transmittal Letters and all costs and expenses incurred in the mailing and publication of this Notice, Proofs of Claim and Transmittal Letters.

CONSIDERATIONS AFFECTING RIGHTS OF SECURITY HOLDERS

Common Stock Owners.

20. After the Merger Date each holder of Common Stock, whether or not a member of the Common Stock Class, will be entitled pursuant to the Merger to a cash payment of $32 per share in cancellation of each share of such Common Stock. Each owner of record of Common Stock on the Merger Date will have appraisal rights under

the laws of the State of Delaware, so that such owner who elects not to accept $32 per share pursuant to the Merger may seek appraisal of the value of the Common Stock owned.

Debenture Owners.

21. A member of the Debenture Owner Class *is not required to submit* the Debenture(s) and accept the $844.16 payment for each Debenture owned. Such member is entitled to hold the Debenture(s) and receive periodic interest payments when due and principal payments at maturity. However, upon consummation of the Merger contemplated by the Settlement Agreement, an owner of Debentures will no longer have the right to convert such Debentures into Common Stock, but will be entitled only to receive a cash payment of $831.17 upon surrender for conversion of each Debenture. Interest in the amount of $27.50 per $1,000 principal amount of Debentures is payable on October 15, 1976 to holders of record on September 30, 1976. Any owner of Debentures who desires to convert such Debentures into Common Stock prior to the Merger in order to exercise the right of appraisal under Delaware law should discuss the advisability of such action with the owner's legal and financial advisors. A conversion of the Debentures into Common Stock will result in the exclusion of the Debenture Owner from the Debenture Owner Class, thereby rendering the owner ineligible to receive the benefits of the Settlement Agreement.

Warrant Owners.

22. A member of Warrant Owner Classes A or B *is not required to submit* the Warrants and accept the $2.50 or $4 payments provided by the Settlement Agreement. However, upon consummation of the Merger contemplated by the Settlement Agreement, an owner of Warrants will no longer have the right to exercise the Warrants for the purchase of Common Stock, but will be entitled only to receive a cash

payment of $32 upon surrender of each Warrant and the payment to Indian Head of the then exercise price (currently $30 per Warrant). In addition, any owner of Warrants who desires to exercise the Warrants to purchase Common Stock prior to the Merger in order to exercise a right of appraisal under Delaware law should discuss the advisability of such action with the owner's legal and financial advisors. Such exercise of the right to purchase Common Stock will result in the exclusion of the Warrant Owner from any Warrant Owner Class, thereby rendering the owner ineligible to receive the benefits of the Settlement Agreement.

ELECTION TO BE EXCLUDED FROM CLASS ACTION

Written Request.

23. Any class member may elect to be excluded from a class by mailing to the Clerk, United States District Court, Southern District of New York, P.O. Box 1046, New York, N. Y. 10005, written request for exclusion on or before September 28, 1976. Any class member requesting exclusion from the proposed settlement must state in writing:

(a) The member's name, address and telephone number;

(b) The number of shares of Common Stock, principal amount of Debentures and number of Warrants the member purchased and sold; and

(c) The number of shares of Common Stock, principal amount of Debentures and number of Warrants the member continues to own.

Consequences of Exclusion.

24. A class member making a request for exclusion will not share in the benefits of the settlement, will not be bound by any judgment entered in the above-captioned actions,

and will only be able to pursue the member's individual claim, if any. Failure to submit a request for exclusion by September 28, 1976 will result in a class member being bound by the terms of any judgment or order in the above-captioned actions, including a judgment and order approving the proposed settlement.

Dated: New York, New York
August 2, 1976

By Order of the Court:

Clerk of the United States District Court
For the Southern District of New York